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THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1205

GEORGE J. FULTON,

Petitioner,

versus

ISADORE HECHT, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE
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FOR THE FIFTH CIRCUIT

George J. Fulton respectfully petitions for writ of certiorari to review the decision of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on September 20, 1978.

OPINIONS BELOW

The Judgment of the United States District Court for the Southern District of Florida was entered on March 12, 1976, without opinion. The opinion of the United

States Court of Appeals for the Fifth Circuit, which appears in the Appendix hereto, is reported at 580 F.2d 1243.[1]

JURISDICTION

The jurisdiction of the Supreme Court is invoked under 28 U.S.C. §1254(1). The decision of the Court of Appeals was rendered on September 28, 1978. A timely Petition for Rehearing was denied by the Court of Appeals on November 6, 1978. This Petition is filed within the time permitted by law.

QUESTION PRESENTED

Does §2 of the Sherman Act (15 U.S.C. §2) prohibit one who has monopoly power over a subjacent market from arbitrarily and capriciously exercising such power with inevitable anticompetitive effects by excluding participants from that market?

STATUTES INVOLVED

United States Code, Title 15

§2. *Monopolizing trade a felony; penalty*

> Every person who shall monopolize or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce

1 For a procedural history of the case, see 545 F.2d 540 (5 Cir.), *cert. denied*, 430 U.S. 984 (1977).

> among the several States, or with foreign nations, shall be deemed guilty of a felony, . . .

§15. *Suits by persons injured; amount of recovery*

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

STATEMENT OF THE CASE

This cause involves the antitrust implications of the exclusion by Respondents of Petitioner George Fulton from racing his greyhound dogs at South Florida dog racing tracks.[2] The event precipitating the exclusion was testimony given by Petitioner under subpoena at a hearing of the Florida Board of Business Regulation on February 11, 1972. The hearing concerned allocation by the Board of racing dates among the three Dade

2 The Respondents are the owners of Flagler Kennel Club. The Respondents are Isadore Hecht, Florence Hecht, David Hecht, Sidney Lefcourt, Isabel Amdur, and Barbara Hecht, d/b/a West Flagler Associates, Ltd. The other area tracks, Miami Beach Kennel Club, Biscayne Kennel Club, Hollywood Kennel Club, and certain of their officials, were alleged in pleadings to be co-conspirators and parties who combined with Respondents though not named as Defendants in the Complaint.

County, Florida, greyhound tracks for the 1972-1973 racing season. The most desirable racing dates were acknowledged to be those during the summer racing season. Respondent Flagler Kennel Club, in prior years, had always been granted those racing dates. Following the hearing in February, the Board, for the first time, awarded the summer racing dates to Biscayne Kennel Club, another Dade County track. In retribution for his testimony, in September, 1972, Flagler Kennel Club refused to renew Petitioner's annual booking contract.[3] Prior to this time, Petitioner's contract had been automatically renewed in each of the 15 years he raced at Flagler.

Petitioner, prior to the events at issue, was a greyhound breeder and racer, and operated a kennel housing approximately 200 greyhound dogs. He had been racing greyhounds in Florida for more than eighteen years, and at Flagler Kennel Club for approximately fifteen years. Petitioner was one of the leading greyhound breeders and racers in the area.

The South Florida greyhound racing tracks, composed of Flagler Kennel Club, Miami Beach Kennel Club, Biscayne Kennel Club, and Hollywood Kennel Club, comprised a self-contained, local year-round

3 Fulton testified that, immediately following the Board hearing, Isadore Hecht, the managing partner of Flagler Kennel Club, said to him:

> . . . I was the first one to bring you down to this country and race here and I am going to be the first one to knock you off. (Appendix on Appeal, pp. 208-209)

market. Pursuant to Florida law, in 1972 the Florida Board of Business Regulation was charged with allocating racing dates among the South Florida tracks, so that the various racing meets in Dade County ran successively. Each Dade County track was the only track holding racing meets at the time it was in operation. Although the Hollywood Kennel Club, in adjacent Broward County, usually had overlapping racing dates, each track in Dade County was essentially a monopoly during the 109 days of the year in which it conducted racing meets.

Each of the South Florida tracks granted annual booking contracts to greyhound operators. While the contracts did not contain provisions for renewal at the end of each year, the industry practice was to renew contracts automatically each year unless the dogs submitted for racing ran poorly or the owner violated the rules of the Florida Board of Business Regulation. Petitioner's dogs repeatedly were among the leading money earners at each of the South Florida tracks. Except for licensing dog owners, the Florida Board of Business Regulation did not regulate the booking system. Thus Respondent Flagler had absolute control over access by dog owners to the only existing facilities for racing during the dates awarded to it.

Furthermore, Flagler Kennel Club, Miami Beach Kennel Club, Biscayne Kennel Club, and Hollywood

Kennel Club jointly owned the only public kennel in South Florida, known as Florida Kennels, Inc., which was equipped to house and train greyhound dogs. By written agreement of the four tracks, Florida Kennels, Inc. had a rule that two kennel buildings were rented to each greyhound racing owner who had booking contracts at all four area tracks, but only one kennel building was rented to an owner who had less than four booking contracts. For many years, prior to the events in question, Petitioner had been allocated two kennel buildings. Testimony at trial reflected that it was absolutely essential to the economic survival of a professional greyhound racing owner that he have booking contracts at all four South Florida tracks. Competitors who were not able to race at all four tracks experienced decreased revenues and were unable to race their dogs continuously, thus drastically affecting overall performance.

Prior to the 1972 hearing, no kennel operator had ever testified before the Florida Board of Business Regulation at a hearing called to allocate racing dates among the competing tracks. Following the hearing, Flagler was outraged at Petitioner's having honored the subpoena, and refused to renew Petitioner's booking contract at Flagler Kennel Club. The result of Flagler's exclusion of Petitioner was to trigger automatically the rule at Florida Kennels, Inc. regarding access to two kennel buildings. Petitioner was ejected immediately from one kennel building at Florida

Kennels, although testimony indicated that there were numerous vacant kennels.

As a result of the actions initiated by Flagler Kennel Club, there were two inevitable anticompetitive effects. First, Petitioner, after having been a leading competitor for many years, was no longer permitted to compete at Flagler which as a monopoly was the only track in operation during a significant part of each year. Secondly, as a readily foreseeable consequence of Respondent Flagler's action, Petitioner was automatically ejected from one of his two kennel buildings at Florida Kennels. Consequently, Petitioner was not only no longer able to compete at Flagler, but also he was no longer able to compete effectively at the other area tracks and was forced to sell some of his dogs.

The District Court granted a directed verdict for Defendants on the 15 U.S.C. §2 claim. The Court of Appeals below affirmed the District Court.

REASONS FOR GRANTING THE WRIT

1. The Decision Below Conflicts With The Decision Of Another Court Of Appeals As To The Proper Interpretation Of 15 U.S.C. §2.

In reliance upon what it conceived to be the proper interpretation of this Court's decisions construing 15 U.S.C. §2 (the "Sherman Act") in *United States v. Colgate & Co.*, 250 U.S. 300 (1919) and in *United States v. Griffith*, 334

U.S. 100 (1948), the Fifth Circuit has here held that exercise of monopoly power is violative of Section 2 of the Sherman Act only when such exercise has an anticompetitive effect on competitors of the one wielding such power. In so holding, the Fifth Circuit acknowledged that its analysis of Section 2 differed from the analysis of Section 2 by the Ninth Circuit in *Deesen v. Professional Golfers Ass'n of America*, 358 F.2d 165 (9th Cir.), *cert. denied*, 385 U.S. 846 (1966). The Fifth Circuit, however, stated that it preferred to interpret the *Deesen* Court's Section 2 analysis to comport with its own view of Section 2 and thereby save *Deesen* "from creating an unacceptable extension of the scope of §2". (App. A, p. 11a, n. 2).

Citing *Griffith, supra*, the Ninth Circuit in *Deesen* stated that:

> It is the existence of monopoly power coupled with the intent to use it . . . with inevitable anticompetitive effects that establishes the offense of monopolization. (358 F.2d at 171)

In the present case, the Fifth Circuit concluded that although this definition from *Griffith* was correct, it could only be applied to the type of situation before the Supreme Court in *Griffith*. Accordingly, the Fifth Circuit found that a unilateral refusal to deal by one possessing monopoly power, even though having an inevitable anticompetitive effect on a subjacent market, is violative of Section 2 only if the monopoly is

comprised of competitors in the market where the anticompetitive effects occur. (App. A, p. 12a, n. 2)

The critical difference between the Section 2 analysis of the Fifth Circuit in the present case and the analysis of Ninth Circuit in *Deesen* is that the Fifth Circuit has created an immunity from the antitrust laws for persons who exercise monopoly power in a manner which results in inevitable anticompetitive effects on subjacent markets which they control but in which they do not compete. The Ninth Circuit clearly denied such a *carte blanche* immunity under Section 2. The Ninth Circuit's analysis in *Deesen* would permit the exercise of monopoly power with inevitable anticompetitive effects on controlled markets only when such exercise is both reasonable under the circumstances and without intent to eliminate or suppress competition.[4]

Deesen involved a challenge to the Professional Golfers Association which, although it did not compete in golf tournaments, frequently decided who could. The present case involved a similar circumstance. Flagler Kennel Club did not compete in the races it sponsored, but it had absolute and arbitrary power to

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4 As the Fifth Circuit acknowledged in its analysis of *Deesen*:
> These . . . considerations . . . tend to support [Petitioner's] argument that a monopolist cannot discriminate unreasonably in determining who competes in a subjacent market. (App. A, p. 11a)

determine who did.[5] The Fifth Circuit's limitation of the ambit of Section 2 of the Sherman Act to direct competitors and its refusal to consider reasonableness of an exercise of monopoly power which has inevitable anticompetitive effects when the one exercising the power controls but does not compete in the market, is irreconcilable with the analysis of Section 2 employed by the Ninth Circuit.[6]

This conflict justifies the grant of certiorari to review the judgment below.

2. The Decision Below Raises Significant And Recurring Problems Concerning 15 U.S.C. §2 And This Court's Interpretation Of Its Application To The Arbitrary And Capricious Exclusion By A Monopolist Of Participants In A Controlled Subjacent Market.

The Fifth Circuit's opinion in this case reflects important statutory and policy considerations as to the

5 In the present case Flagler was the only game in town. It was an absolute monopoly during a significant part of each year. No standards were set which when met assured access to the market and no reason need be given to those who were excluded. The exercise of monopoly power by Flagler was made all the more egregious by the capricious manner in which it was wielded here.

6 Indeed, the Fifth Circuit itself has acknowledged the advisability of reviewing the reasonableness of monopoly action in Section 2 cases. Cf. *Hatley v. American Quarter Horse Ass'n*, 552 F.2d 646 (5th Cir. 1977). As the Fifth Circuit Court stated in *Hatley*,

> . . . Defendants would find judicial review less perilous if they adopted a few procedural niceties. (552 F.2d 646, 654 at n. 8)

distinction between the arbitrary exercise of unregulated monopoly power which adversely affects controlled subjacent markets, and the exercise of such power for justified, proper purposes. Since this Court has not had occasion to address itself directly to this issue, there are compelling reasons why more definitive guidelines in the application of Section 2 of the Sherman Act should now be established by this Court. The exercise of monopoly power over controlled subjacent markets is an increasing occurrence, and both litigants and lower courts urgently need the assistance of this Court in understanding the application of the Sherman Act in these circumstances.

The unanswered question of primary importance is: Once monopoly power to control competition in a subjacent market is established, does *Colgate, supra*, permit an arbitrary exclusion of competitors from that market? Read literally *Colgate* might appear to permit such an exclusion. However, *Colgate* did not involve an exercise of monopoly power as does the present case, and *Colgate* assumed the existence of an alternate market in which the one excluded could otherwise compete. Yet the existence of a monopoly frequently, as in the present case, precludes any alternate markets. Under such circumstances, exercise of monopoly power to arbitrarily exclude competitors from the market place has inevitable anticompetitive results

which should not be condoned by reliance on *Colgate*.[7]

Subsequent to *Colgate*, this Court has explored issues related to those in the instant case, but has failed to provide sufficient guidance for their resolution. *E.g. Otter Tail Power Co. v. U.S.*, 410 U.S. 366 (1973); *Silver v. New York Stock Exchange*, 373 U.S. 341 (1963); *Lorain Journal Co. v. U.S.*, 342 U.S. 143 (1951); *U.S. v. Paramount Pictures*, 334 U.S. 131 (1948); *U.S. v. Griffith, supra;* and *Associated Press v. U.S.*, 326 U.S. 1 (1945). Most significant of these is *Griffith*, wherein this Court made it clear that Section 2 of the Sherman Act prohibits conduct or business arrangements which are anticompetitive and that the use of monopoly power to restrict competition is unlawful. Both *Griffith* and the other cases referred to above emphasized that the primary purpose of the Sherman Act was to prevent use of monopoly power to foreclose competition. Significantly, none of these cases restricted application of this purpose to direct competitors.

The confusion resulting from the present state of the law in this area is demonstrated by the Ninth Circuit's interpretation in *Deesen, supra*, and the Fifth Circuit's interpretation in the present case. The *Deesen* Court

7 It has been suggested that *Colgate* is a barrier to proper analysis of the Sherman Act and should be reconsidered. *See*, Turner, *The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal*, 75 Harv. L. Rev. 655 (1962). Others have suggested that those who control a facility essential to competitive viability should grant access on reasonable terms. *See*, Watson and Brunner, *Monopolization by Regulated "Monopolies": The Search For Substantive Standards*, 22 Antitrust Bull. 559, 571 (1977); *The Peelers Co.*, 65 F.T.C. 799 (1964) (See separate opinion of Commissioner Elman.)

determined that Section 2 applies when the one possessing monopoly power controls but does not compete in a market if he acts unreasonably and with "inevitable anticompetitive effects".[8] In the present case the Fifth Circuit, taking an entirely different tack, denied any consideration of reasonableness is necessary in such situations and applied *Colgate* literally.[9]

To resolve these significant and recurring issues, certiorari should be granted to review the judgment below.

CONCLUSION

For these reasons, a writ of certiorari should be issued to review the judgment and opinion of the Fifth Circuit.

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8 In *Sargent-Welch Scientific Co. v. Ventron Corp.*, 567 F.2d 701 (7th Cir. 1978) the Seventh Circuit also indicated that Section 2 of the Sherman Act might apply even though direct competitors were not involved, stating:

> There are kinds of acts which would be lawful in the absence of monopoly but, because of their tendency to foreclose competitors from access to markets or customers *or some other inherently anticompetitive tendency, are unlawful under Section 2 if done by a monopolist.* (567 F.2d at 711, 712) (Emphasis added)

9 The Fifth Circuit below found that the conduct involved here was cognizable only under Section 5 of the Federal Trade Commission Act, 15 U.S.C. §45, under which there is no private cause of action. (App. A, p. 12a, n. 2)

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CERTIFICATE OF SERVICE

I, Jay M. Vogelson, a member of the Bar of the Supreme Court of the United States, hereby certify that I have served three copies of the foregoing Petition for Writ of Certiorari on counsel for Respondents, by depositing same in the United States mails, postage prepaid, on February ____, 1979, addressed to Stuart W. Patton, Esq., and Herbert L. Nadeau, Esq., of Patton, Kanner, Segal, Zeller, King & Middelthon, 3rd Floor, Northeast Airlines Building, 150 S.W. Second Avenue, Miami, Florida 33131, counsel for all Respondents.

Jay M. Vogelson

APPENDIX A

George J. FULTON,
Plaintiff-Appellant,

v.

Isadore HECHT et al.,
Defendants-Appellees.

United States Court of Appeals,
Fifth Circuit.

Sept. 28, 1978.

Appeal from the United States District Court for the Southern District of Florida.

Before CLARK and GEE, Circuit Judges, and LYNNE*, District Judge.

GEE, Circuit Judge:

In 1972, West Flagler Kennel Club, a South Florida dog track owned and managed by the individual defendants, refused to renew a booking contract with George Fulton, a breeder and racer of greyhounds. Fulton brought this action, alleging, *inter alia*, violation of federal antitrust laws and commission of a state law tort. The district court entered final judgment for

* Senior District Judge of the Northern District of Alabama, sitting by designation.

defendants. Plaintiff appeals from the district court's disposition of all his claims with the exception of the dismissal of his breach of contract claim. We affirm.

BACKGROUND

George Fulton raises and races greyhounds. He maintains a breeding farm in Nueces County, Texas, and up until the events complained of in this lawsuit he had raced his dogs at four South Florida tracks for approximately fifteen years. Three of these tracks, West Flagler Kennel Club, Miami Beach Kennel Club, and Biscayne Kennel Club, are located in Dade County. The fourth, Hollywood Kennel Club, is in neighboring Broward County. The tracks are allocated racing dates by the Florida Board of Business Regulation. Each of the three Dade County tracks operates for approximately 109 days per year, and except for slight overlaps at the beginning and end of a racing season, no two of these tracks are in operation at the same time. The Broward County track is also open 109 days per year during which time one of the Dade County tracks is always in operation.

Contracts between dog owners and the tracks are made on a season-to-season basis. Under these contracts the owner of the track agrees to let the dog owner race at his track, and in return the dog owner promises to race a certain number of dogs at the track. The dog owner receives a share of the track's profits and competes with other dog owners for prize money awarded for dogs who win, place or show.

Following the 1972 summer season West Flagler Kennel Club (Flagler), owned and managed by defendants, refused to renew Fulton's contract for the upcoming fall season. Fulton alleged and presented evidence tending to show that this refusal stemmed from the fact that he had testified before the Board of Business Regulation at its hearing to determine the allocation of racing dates for 1973. Fulton testified in response to a subpoena, and the uncontroverted evidence established that the substance of his testimony was that the facilities at Flagler and Biscayne Kennel Club were comparable. After the hearing the Board awarded the 1973 summer racing dates to Biscayne Kennel Club. The summer dates are the most lucrative for the tracks, and Flagler had usually been awarded those dates.

According to plaintiff's evidence, Isadore Hecht, the managing partner of Flagler, was outraged by plaintiff's testimony and the loss of the summer racing dates. Several witnesses testified that Hecht refused to renew plaintiff's booking contract in retaliation. Witnesses for the defendants testified that Hecht's refusal was not so motivated. They testified that Fulton had always been a trouble-maker and that he had resisted certain innovations, such as marathon and hurdle races, which Flagler had sought to introduce into its racing program.

The four tracks own the only public kennels in the area, Florida Kennels, Inc., which provides facilities for

dog owners who race at any of the four area tracks. If a dog owner races at all four tracks he may lease two kennels; a dog owner racing at one, two or three of the tracks may lease only one kennel. Until Flagler refused to renew his contract, plaintiff had been racing at all four tracks and had occupied two kennels. When he lost his contract at Flagler, he also lost his second kennel under the four-track/two-kennel rule.

Plaintiff's motley complaint asserted claims based on: (1) violation of section 2 of the Sherman Act, 15 U.S.C. §2; (2) violation of section 1 of the Sherman Act, 15 U.S.C. §1; (3) violation of 42 U.S.C. §1983; (4) violation of 42 U.S.C. §1985; (5) tort; and (6) breach of contract. The district court dismissed all but the antitrust claims, granted a directed verdict for defendants on the section 2 Sherman Act claim, and entered final judgment on a jury verdict for defendants on the section 1 Sherman Act claim. Another panel of this court has already affirmed the district court's dismissal of the section 1983 claim. *See Fulton v. Hecht*, 545 F.2d 540 (5th Cir.), *cert. denied*, 430 U.S. 984, 97 S.Ct. 1682, 52 L.Ed.2d 379 (1977). Except for the dismissal of the breach of contract claim, which plaintiff does not appeal, we now consider the remaining issues.

SECTION 2 CLAIM

Plaintiff makes two arguments in support of his contention that the district court improperly directed a verdict for defendants under section 2 of the Sherman

Act, 15 U.S.C. §2. Essential to both arguments is the assertion that Flagler had monopoly power in the relevant market. First, plaintiff argues that Flagler used its monopoly power to enhance or maintain its monopoly. Second, he argues that as a monopoly Flagler has a duty to deal fairly with dog owners who seek to compete at its track.

Turning first to the common element of both arguments, i.e., the existence of monopoly power in the relevant market, we pause merely to note the presence of some interesting questions which we need not decide. Both sides presented evidence on the definition of the relevant market. Plaintiff sought to introduce an expert's deposition on this issue, but the proffer was not accepted. The cynosure of the relevant market dispute was the Daytona Beach Kennel Club in Volusia County, some 200 miles from the four South Florida tracks. If the Daytona Beach track be not included, Flagler appears to control 25% of the market, since it shares the South Florida dog track market with three other tracks which are, generally speaking, allocated an equal number of racing days per year. If the Daytona track is included, Flagler's market share would fall to a mere 20%. Plaintiff did race his dogs, at least occasionally, at the Daytona track.

Regardless of whether the Daytona Beach track is included, the defendant's market share is much lower than the percentages that courts have treated as indicative of monopoly power. *See, e.g., United States v.*

Grinnell Corp., 384 U.S. 563, 571, 86 S.Ct. 1698, 16 L.Ed.2d 778 (1966) (87%); *Cliff Food Stores, Inc. v. Kroger, Inc.*, 417 F.2d 203, 207 n.2 (5th Cir. 1969) (suggesting minimum of 50%); *United States v. Aluminum Co. of America*, 148 F.2d 416, 425 (2d Cir. 1945) (90%); *Cf. United States v. United Shoe Machinery Corp.*, 110 F.Supp. 295, 343 & n.1 (D. Mass. 1953), *aff'd*, 347 U.S. 521, 74 S.Ct. 699, 98 L.Ed. 910 (1954) (market share not controlling).

But, the plaintiff argues, market share is not the determinative factor in assaying the existence of monopoly power. Monopoly power is "the power to control prices or exclude competition." *United States v. E. I. Du Pont De Nemours & Co.*, 351 U.S. 377, 391, 76 S.Ct. 994, 1005, 100 L.Ed. 1264 (1956). Plaintiff argues that the sterile percentage of market approach should not be applied to the South Florida greyhound racing industry. Although each track may have only 25% of the market, the fact that only one track is operating at any given time makes each track's power significantly greater than that of a firm whose sales represent 25% of a normal market. According to plaintiff, the economics of this industry are such that a dog owner must be able to race year round in order to be competitive. Ignoring the Broward County track for the moment, plaintiff contends that each track has absolute monopoly power during the three months of the year when it is the only track in operation. Thus, each track can dictate the terms of booking contracts.

Plaintiff further argues that the tracks have increased their power by creating Florida Kennels.

Through their agreement that a dog owner may lease two kennels only if he races at all four tracks, each track has the power to take away a kennel from a dog owner who, like plaintiff, races at all four tracks by not renewing the contract for the next season. Just as the economics of the industry require a dog owner to race year round, they also require that a dog owner have two kennels. At least this is plaintiff's contention.

Fortunately, we do not have to evaluate plaintiff's arguments for the existence of monopoly power. Assuming *arguendo* that Flagler has a monopoly, plaintiff has failed to make out a section 2 violation because he did not present any evidence that Flagler used its power to enhance or maintain its position. *See United States v. Grinnell Corp.*, 384 U.S. at 570-71, 86 S.Ct. 1698. The Supreme Court's holding in *United States v. Colgate & Co.*, 250 U.S. 300, 39 S.Ct. 465, 63 L.Ed. 992 (1919), although tarnished in its application to resale price maintenance, *see United States v. Parke, Davis & Co.*, 362 U.S. 29, 80 S.Ct. 503, 4 L.Ed.2d 505 (1960), has yet to be overruled: "In the absence of any purpose to create or maintain a monopoly, the act does not restrict the long recognized right of a trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal . . . ." 250 U.S. at 307, 39 S.Ct. at 468. *Cf. Lorain Journal Co. v. United States*, 342 U.S. 143, 72 S.Ct. 181, 96 L.Ed. 162 (1951). Any monopoly power which the defendant has was thrust upon it by the Florida Board of Business Regulation. Even though the jury could have found that defendants' refusal to renew the con-

tract was in retaliation for the plaintiff's testimony before the Board, such a finding would not support the monopolization claim. Plaintiff argues that Flagler sought to make an example of him so that other dog owners would not respond to subpoenas in the future. But regardless of whether dog owners do or do not testify in the future, Flagler will continue to receive its allocation of one-third of the racing dates in Dade County. Plaintiff has not suggested that such testimony will cause defendant to lose its present share of the market. Indeed, we cannot see how defendants' market share would be affected at all.

Plaintiff did present evidence that the summer racing dates were the most lucrative for the tracks and that Flagler had usually received the summer dates in the past. After plaintiff testified before the Board that the facilities at Biscayne Kennel Club and Flagler were similar, the Board granted the 1973 summer dates to Biscayne. Thus, defendants might be said to have acted in an effort to maintain or reacquire the summer dates. But plaintiff does not argue that defendants had a monopoly over summer dates.

As an alternative to his argument under the traditional standards used by the courts to determine whether a section 2 violation has occurred, plaintiff contends that a monopolist has a duty to deal fairly with anyone who seeks to compete in an adjacent

market.[1] According to plaintiff, one who has monopoly control over a market can exclude someone who seeks to compete in a subjacent market only on the basis of reasonable rules and regulations applied equally to all such persons. Plaintiff cites several cases in support of this proposition, but they all contain the essential element of a combination. This situation exists, for example, when several competitors in one market combine to form a single monopolistic entity in an adjacent market. Such fact patterns bring both section 1 and section 2 of the Sherman Act into play. *See, e.g., Deesen v. Professional Golfers' Association of America*, 358 F.2d 165 (9th Cir.), *cert. denied*, 385 U.S. 846, 87 S.Ct. 72, 17 L.Ed.2d 76 (1966); *Gamco, Inc. v. Providence Fruit & Produce Building, Inc.*, 194 F.2d 484 (1st Cir.), *cert. denied*, 344 U.S. 817, 73 S.Ct. 11, 97 L.Ed. 636 (1952); *Blalock v. Ladies Professional Golf Association*, 359 F.Supp. 1260 (N.D.Ga. 1973). Since these fact patterns involve section 1's prohibition of combinations in restraint of trade, the courts must judge the acts of the monopolist/combination under a

1 Plaintiff also argues that he and Flagler are direct competitors in that, in plaintiff's words, they "compete" for distribution of the track's share of wagers placed by the betting public. Under Florida law, 83% of the wagers placed are returned to the bettors who hold the winning tickets. Of the remaining 17%, 7% is paid to the State of Florida. The last 10% is divided between the track and the dog owners according to the terms of the individual booking contracts. Apparently under industry practice the track retains 8% and the dog owners receive 2%. Despite plaintiff's efforts to characterize the relationship of the track and the dog owners as a competitive one, it is obvious that they do not "compete" for the division of the pool. The parties are in a vertical relationship similar to that of most buyers and sellers of goods or services, and they negotiate between themselves the price the track pays in return for the dog owners' services.

stricter standard than they would that of a truly individual firm. *See, e.g., Eastern States Retail Lumber Dealers' Association v. United States,* 234 U.S. 600, 614, 34 S.Ct. 951, 58 L.Ed. 1490 (1914). This is true even if that individual firm is a monopoly. *See United States v. Colgate, supra.*

Typical of the cases relied upon by plaintiff in *Deesen v. Professional Golfers' Association of America, supra.* The Professional Golfers' Association (PGA) is, as its name suggests, an organization composed of professional golfers. It sponsors almost all of the professional golf tournaments in the United States and determines which golfers play in those tournaments. Deesen was a golfer who did not meet the eligibility criteria established by the PGA. He claimed that these criteria, created by the agreement of member golfers, constituted an unreasonable restraint of trade in violation of section 1 of the Sherman Act. He also claimed that the PGA had monopolized the industry in violation of section 2. The court evaluated the reasonableness of the restraints imposed by the eligibility standards and found that their interference with free competition was outweighed by their legitimate purposes and procompetitive effects. The court thus held that section 1 had not been violated. The court also held that there was no section 2 violation since the PGA had not used its position to exclude any competitor in the market of sponsoring professional golf tournaments, nor had it used its power "to exclude golfers from access to PGA

sponsored tournaments" or to hinder competition among professional golfers. 358 F.2d at 171. It is these latter two considerations which tend to support plaintiff's argument that a monopolist cannot discriminate unreasonably in determining who competes in a subjacent market. The parallel which plaintiff seeks to draw is an obvious one: the PGA, which does not compete as a golfer in professional tournaments, can determine who competes in those tournaments only on the basis of reasonable eligibility requirements. A similar test should be applied to a dog track, which does not own the greyhounds competing at the track. While one might read *Deesen* this way, we think that the court's holding and the fact that it considered the reasonableness of the regulations under the section 2 monopoly claim must be limited to the circumstances of that case. The key element, we think, is that the PGA was an association made up of professional golfers, i.e., direct competitors in the market of participating as golfers in professional golf tournaments.[2]

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2 Although the *Deesen* court did not justify its §2 analysis on these grounds, we think that our reading of the case is the only way to save that case from creating an unacceptable extension of the scope of §2. E.g., the court states: "It is the existence of monopoly power coupled with the intent to use it for anticompetitive purposes or with inevitable anticompetitive effects that establishes the offense of monopolization. *United States v. Griffith,* 334 U.S. 100, 107, 68 S.Ct. 941, 92 L.Ed.2d 1236." 358 F.2d at 171. This definition, taken loosely from *Griffith,* is correct insofar as it is limited to the type of situation before the Court in *Griffith.* There the Court was confronted with the use of monopoly power in certain markets. i.e., towns with only one theater, to create monopolies or restrain competition in separate markets, i.e., towns where the defendants competed with other theaters. The anticompetitive purposes and effects were thus aimed at and felt by competitors of the defendants. A broader use of this definition would place more severe restrictions on a monopolist's behavior

SECTION 1 CLAIM

Plaintiff's second antitrust claim, and the only claim presented to the jury, was that the agreement among the four tracks limiting use of two kennels at Florida Kennels, Inc. to those dog owners who raced at all four tracks constituted an unreasonable restraint of trade in violation of section 1 of the Sherman Act. As noted above, Florida Kennels allows a dog owner who races at all four tracks to rent two kennels and a dog owner who

---

than §2 imposes. While it appears that a monopolist could have an anticompetitive purpose only with respect to its competitors or potential competitors, the anticompetitive effects of a monopolist's behavior might occur only in an adjacent market. If such effects, standing by themselves were sufficient to constitute a violation of §2, the right of a single firm to refuse to deal with another, recognized in *Colgate, supra*, would be significantly reduced. Not only would a firm's unilateral refusal to deal violate §2 if it was done to enhance or maintain the monopoly, such a refusal would also violate §2 if it had an inevitable anticompetitive effect in an adjacent market. The limitation on the *Colgate* doctrine is justifiable if the monopoly is really just an association of competitors in the market where the anticompetitive effects are felt. *See United States v. Terminal Railroad Ass'n*, 224 U.S. 383, 32 S.Ct. 507, 56 L.Ed. 810 (1912). However, we think any broader reading of §2, with the accompanying private cause of action under §4 of the Clayton Act, 15 U.S.C. §15, would be unwise.

This is not to say that a monopolist's behavior having inevitable anticompetitive or other undesirable economic effects solely in an adjacent market can never violate any of the antitrust statutes. E.g., this court has held that §5 of the Federal Trade Commission (FTC) Act, 15 U.S.C. §45, prohibits a monopolist from discriminating between buyers in the price he charges for his product. *See La Peyre v. FTC*, 366 F.2d 117 (5th Cir. 1966). Thus, under §5 of the FTC Act, a monopolist may be required to use uniform and reasonable criteria when dealing with those who compete in an adjacent market. Such a duty is no help to the instant plaintiff because his action is based on §2 of the Sherman Act, and there is no private cause of action for violation of the FTC Act. *See, e.g., Holloway v. Bristol-Myers Corp.*, 158 U.S.App.D.C. 207, 485 F.2d 986 (1973); *Carlson v. Coca-Cola Co.*, 483 F.2d 279 (9th Cir. 1973).

races at one, two or three of the tracks to rent only one kennel.

The defendants presented evidence tending to show that the four tracks established the kennels because dog owners needed facilities to house and train their dogs. If a dog owner raced at all four tracks he would frequently be forced to race at two tracks simultaneously. While one kennel is adequate to house and train dogs for racing at one track, a second kennel is needed if the dog owner is at the same time racing at a second track. Since it is possible that one racing at fewer than all four tracks might face overlapping dates, especially if one of the tracks at which he races is the Broward County track, Florida Kennels has a provision which allows such an owner to apply for an extra kennel during the period of conflicting dates.

Plaintiff presented evidence tending to show that there were empty kennels at the Florida Kennels at the time he was deprived of his second kennel. This evidence, if believed by the jury, would undermine defendants' purported rationale for creating the four-track/two-kennel rule and for applying it to plaintiff, i.e., that the kennel space was needed by other dog owners racing at the area tracks. He also presented evidence tending to show that the effect on his ability to compete was devastating. According to plaintiff, one needed two kennels in order to compete effectively even if one raced at less than all four tracks. Plaintiff claims that he was thus forced to sell 36 of his greyhounds in the two years following his loss of the

second kennel. Although he continued to race sporadically at the area tracks other than Flagler for several years, he eventually ceased racing in South Florida altogether. Defendants presented evidence that other dog owners racing at all four tracks competed effectively with only one kennel at Florida Kennels and that numerous dog owners competed at fewer than all four tracks with one or no kennel at Florida Kennels.

The evidence clearly presented a jury issue on the reasonableness of the agreement. The jury held in favor of the defendants, and that finding should not be disturbed here.

Plaintiff's main attack on the section 1 claim is that the judge erred in the way he presented the issues to the jury. He contends that the court improperly restricted the jury in its consideration of the relevant facts in that it refused to instruct the jury to consider Flagler's nonrenewal of the contract, and the reasons therefor, in evaluating the reasonableness of the four tracks' agreement. However, plaintiff presented no evidence that it was part of the agreement among the four tracks that he, or anyone else, would not have his booking contract renewed for testifying before the Board of Business Regulation or for any other reason. In other words, there is no indication that any specific refusal to enter or renew a booking contract was within the scope of the agreement.

Nonetheless, it was obviously envisioned by the four tracks that any one of them could trigger the four-track/two-kennel rule by refusing to renew a contract for reasons sufficient to that individual track. Thus, the district court properly told the jury that it could consider the possibility that one track owner might arbitrarily or unreasonably not allow someone to race at his track in determining the overall reasonableness of the agreement. The court's refusal to package the issue as plaintiff wished was not error.

Plaintiff also complains of several other aspects of the instructions to the jury. These objections are all frivolous and not worthy of discussion.

SECTION 1985 CLAIM

In Count VI of his first amended complaint the plaintiff alleged that the defendants had conspired to deprive him of his constitutional rights in violation of 42 U.S.C. §1985. The district court dismissed this claim because plaintiff failed to allege a racial or other class-based animus. *Griffin v. Breckenridge*, 403 U.S. 88, 91 S.Ct. 1790, 29 L.Ed.2d 338 (1971). Plaintiff now contents that he could have alleged a class-based animus if only the district court had allowed him to amend his complaint.

Although the district court did not expressly grant leave to amend this count in its order dismissing the section 1985 claim, it did consider plaintiff's subse-

quent motion for leave to file a second amended complaint. The tendered amended complaint merely restated verbatim the section 1985 count from the first amended complaint. Since the plaintiff had not cured the deficiency, the court properly refused to grant plaintiff's motion. At no time did plaintiff make an effort to correct his claim to include an allegation of class-based animus, and there is no indication in the record that the district court would not have allowed an amendment containing the necessary elements. The action of the district court was inarguably fair and correct.

THE TORT CLAIM

In addition to his claims under federal law, the plaintiff alleged in his complaint that the defendants had committed an unnamed and hitherto unrecognized tort under Florida law. The district court dismissed this count for failure to state a claim. On appeal the plaintiff argues that the mere fact that the tort has not been recognized in the past does not mean that such a cause of action does not exist. He contends that the district court should have heard the claim on either of two theories: (1) intentional infliction of economic harm, or (2) interference with state administrative proceedings.

The only act committed by the defendants was the refusal to renew a contract which had, by its own terms, expired. Obviously, the defendants had no contractual duty to renew. Indeed, it appears to us that the

defendants were under no duty of any sort to renew the contract. The law of tort is well established that an individual can refuse to enter into a contract or to maintain a business relationship terminable at will for any reason sufficient to himself. *See House of Materials, Inc. v. Simplicity Pattern Co.*, 298 F.2d 867, 872-73 (2d Cir. 1962), *citing, inter alia*, 4 RESTATEMENT OF TORTS §762, comments a, b and c. In the only discovered Florida case that addresses the issue, the Florida court expressed its agreement with this uniformly accepted principle. *See NAACP v. Webb's City, Inc.*, 152 So.2d 179, 183 (Fla.Dist.Ct.App.1963), *vacated as moot*, 376 U.S. 190, 84 S.Ct. 635, 11 L.Ed.2d 602 (1964). Thus, it is clear that plaintiff has no cause of action in tort. Even if defendants did intentionally inflict economic harm on the plaintiff, such behavior is tolerated by the law because of the state's interest in protecting the individual freedom to enter, or to refrain from entering, into contractual relationships.

Furthermore, plaintiff does not state a cause of action in tort under his allegation of interference with an administrative agency. Assuming that the defendants caused such an interference, that does not make their action wrongful to the plaintiff. Any harm to the state's ability to govern can be adequately vindicated in an action brought by the state.

Having carefully considered all the claims raised by plaintiff, including those not decided by this court in plaintiff's first appeal, *see Fulton v. Hecht*, 545 F.2d 540

(5th Cir.), *cert. denied*, 430 U.S. 984, 97 S.Ct. 1682, 52 L.Ed.2d 379 (1977), we find that the district court's disposition of the case was in all respects correct. Accordingly, the judgment of the district court is AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

OFFICE OF THE CLERK

November 6, 1978

EDWARD W. WADSWORTH
Clerk

TO ALL PARTIES LISTED BELOW;

NO. 76-2391 — GEORGE J. FULTON vs. ISADORE HECHT, ET AL.

Dear Counsel:

This is to advise that an order has this day been entered denying the petition for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate

Procedure; Local Fifth Circuit Rule 16) the petition for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH,
Clerk
/s/ SALLY HAYWARD
Deputy Clerk

Supreme Court, U. S.
FILED
MAR 13 1979
MICHAEL RODAK, JR., CLERK

Supreme Court of the United States

October Term, 1978

No. 78-1205

GEORGE J. FULTON,
Petitioner,

vs.

ISADORE HECHT, *et al.,*
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION

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TEXTUAL REFERENCES

R.—Refers to the Original Record of Pleadings, etc. in the proceedings below before the Fifth Circuit Court of Appeals.

A.—Refers to the Appendix in the proceedings below before the Fifth Circuit Court of Appeals.

P.—Refers to the Petition for Writ of Certiorari.

PA.—Refers to Appendix to the Petition for Writ of Certiorari.

CITATIONS

Cases

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION

RESTATEMENT OF THE CASE BY RESPONDENTS

Due to inaccuracies and omissions in Petitioner's Statement, Respondents are forced to completely restate the case and facts.

CHRONOLOGY OF THE CASE BELOW

Petitioner's Application for Writ is taken from that portion of the Fifth Circuit's Decision of September 20th, 1978 affirming a directed verdict in favor of Respondents on a Sherman Act §2 charge granted by the District Court for the Southern District of Florida in March, 1976. The District Court had entered judgment pursuant to a special verdict returned by a jury following a trial of eight days' duration concerning alleged Sherman Act §1 violations.

Respondents are Florence Hecht, Melvin N. Greenburg, Marshall N. Feuer and Samuel Gordon, all as executors of the estate of Isadore Hecht, a deceased general partner of West Flagler Associates, Ltd., a Florida limited partnership, and David Hecht, Sidney Lefcourt, Isabel Amdur and Barbara Hecht, also general partners of the same limited partnership. All were sued as such general partners.

The partnership operated West Flagler Kennel Club, a greyhound racing track in Dade County, Florida. The general partners, the partnership, and the dog track will hereafter be collectively referred to as "Flagler".

Petitioner Fulton ("Fulton") is an owner, breeder, and operator of racing greyhounds. On September 1, 1972, three days before his booking contract to race greyhounds at Flagler expired, Fulton filed his original Complaint in the Southern District of Florida. The substance of this Complaint was that Flagler had not renewed the booking contract because Fulton had testified at a Florida Board of Business Regulation hearing on February 11, 1972, which resulted in choice summer racing dates being awarded to another dog track, Biscayne Kennel Club.

Neither the original Complaint nor the First Amended Complaint mentioned any violation of the Sherman Act. On March 1, 1974, Fulton filed his Second Amended Complaint (R. 695). Count I of the Second Amended Complaint contained a 42 U.S.C. §1983 Civil Rights Count; Count II contained the Sherman Act §1 charge, and Count III contained the Sherman Act §2 charge. No mention was made of the identity of any conspirator other than Flagler.

In January, 1975 the allegation that the Sherman Act was violated due to the 1970 Florida Kennels, Inc. policy first surfaced in a unilateral pre-trial stipulation filed by Fulton. In May, 1975 Fulton first disclosed the identity of

the alleged co-conspirators by filing a list in the District Court which included the other Miami area dog tracks, Miami Beach Kennel Club, Biscayne Kennel Club and Hollywood Kennel Club and certain of their officials.

The District Court took testimony on the §1983 State Action Issue and ruled against Fulton. An expedited appeal was taken to the Fifth Circuit which affirmed the District Court (545 F.2d 540) and certiorari was denied (430 U.S. 984).

The alleged Sherman Act violations were tried to a jury on March 1-10, 1976. At the conclusion of Fulton's evidence on liability, Flagler moved for a directed verdict, which the Court granted only as to the §2 Sherman Act claim. The jury thereupon returned a verdict on the Sherman Act §1 count in favor of the Respondents and final judgment was entered by the District Court. An appeal on both of the Sherman Act and certain other issues ensued to the Fifth Circuit Court of Appeals. The Fifth Circuit Court of Appeals affirmed the District Court in all respects and Petitioner's Application for Writ followed.

FACTUAL SUMMARY

Flagler has operated a pari-mutuel greyhound racing track in Dade County, Florida, for many years. It is allocated 109 racing days each year by order of the State of Florida Board of Business Regulation. The other two dog tracks in Dade County, Florida, Biscayne Kennel Club and Miami Beach Kennel Club, are also allocated 109 days apiece (A. 335, 428).

Because no racing is allowed on Sunday, the racing dates of the three Dade County dog tracks overlap to a certain extent (A. 336-337).

Hollywood Kennel Club, operating in southern Broward County, Florida, immediately north of Dade County, is free to operate at any time and consequently is always running at the same time as one of the three Dade County tracks. Dade County tracks may also run in opposition to each other (A. 665). In addition to competition from other dog tracks, Flagler competes directly with three horse tracks and two jai alai frontons in the Dade-Broward County, Florida, area for the public's betting dollars (A. 448).

Over the years, Flagler has pioneered innovations in greyhound racing such as racing over longer distances (7/16ths or 9/16ths of a mile instead of 5/16ths), commonly referred to as "marathons", hurdle racing and also daytime racing in competition with flat track horse racing, commonly referred to as "matinees" (A. 388, 392).

Greyhound tracks do not own their own greyhounds but contract with independent dog owners who agree to furnish an agreed number of animals for all kinds of racing at the track for agreed periods of time, in return for an opportunity to win a portion of the betting pool belonging to the track. Such contracts are commonly known as booking contracts (A. 667). These contracts usually contain no provision for automatic renewal and coincide with one or more greyhound racing seasons lasting from September of one year through August of the next year (A. 456-458).

Flagler generally contracts with thirty-two different dog owners for its racing meets and this was the case during the 1971-72 racing season (A. 384).

Fulton had raced at Flagler under booking contracts since late 1957 (A. 185). Among his fellow dog owners he had a reputation as the "uncrowned champion griper in

America" (A. 309), and was a "problem child" from Flagler's viewpoint (A. 514). This stemmed chiefly from Fulton's acknowledged aversion and reluctance to furnish animals for the innovations which Flagler had introduced into greyhound racing—matinees, marathons and hurdle racing (A. 201, 515, 397) and his complaints in various public fora on these subjects (A. 201-203).

On February 11, 1972, Fulton was subpoenaed by Biscayne Kennel Club to testify before the Florida Board of Business Regulation at the Dade County Courthouse, Miami, Florida. One of the items on the agenda was the allocation of Summer racing dates for the 1972-73 racing season. All of the Dade County greyhound racing tracks had requested racing dates for this period. Fulton's testimony was neither harmful to nor in favor of either Biscayne or Flagler (A. 394, 513) although Fulton did mention that he did not like matinee racing which both tracks offered (A. 201).

Testimony conflicted as to what occurred immediately after the Board of Business Regulation hearing, with Respondents' witnesses generally denying that Isadore Hecht, a general partner of Flagler, now deceased, used foul language while in effect telling Fulton that he was going to sever their business relationship (A. 208). Testimony also differed as to Fulton's advance knowledge of the nonrenewal of his booking contract at Flagler.

However, on July 30, 1972 Fulton received a letter from Flagler notifying him that his booking contract, which would expire on September 4 of that year, would not be renewed (A. 229).

Fulton appeared to admit that the relevant market for his business of selling his greyhounds' racing services was considerably broader than the Dade-Broward

County area admitted as the relevant market by his counsel (A. 92, 98).

Fulton testified that in addition to racing at Flagler during the summer of 1972, he was, in accordance with past practice, also racing a kennel of greyhounds at the Daytona Beach Kennel Club in Volusia County, Florida (A. 231). He testified that on September 4, 1972, he had between thirty-six (36)and thirty-eight (38) greyhounds in Dade County, Florida, from the Flagler meeting and an equal number at Daytona Beach (A. 234).

Fulton kept the dogs he was racing at Flagler at Florida Kennels, Inc., a common holding compound, the corporate shares of which were owned equally by the four Dade-Broward County dog tracks. Florida Kennels, Inc. leased a total of 35 kennel buildings to dog owners while they were racing at the local tracks (A. 669). John Travis, then General Manager of Florida Kennels, Inc. informed Fulton that since he no longer had booking contracts at all four local tracks, he could not retain two kennels on a full-time basis and he would have to vacate one of his two kennel buildings (A. 238). The reason given was the policy decision made by the Executive Committee of Florida Kennels, Inc. in 1970 to the effect that dog owners having one or more but less than 4 booking contracts would be eligible for only one kennel building. The policy had been instituted because of a shortage of kennel buildings that had developed over the years (A. 669). However, this policy specifically provided that:

> "For special circumstances, such as conflicting dates, please contact the manager and your case will be reviewed by the Executive Committee." (A. 668)

Fulton made no such request (A. 239). Yet Perrine Palmer, an officer at Hollywood Kennel Club, testified

that had Fulton come to him during the Fall of 1972, he would have seen that Fulton had more kennel space because he had contracted to race at both Miami Beach and Hollywood during the winter of 1972-73 (A. 482).

Travis did recall that there was a need for kennel space because of Flagler's Fall meeting and because of Hollywood Kennel Club's upcoming meeting (A. 322). The Flagler meet started on September 3, 1972 and ran through January 3, 1973. Hollywood began December 26, 1972 and ran through May 2, 1973, and Miami Beach began January 4, 1973 and ran through May 4, 1973 (A. 665).

Fulton could not recall whether there were any vacant kennels in September, 1972 (A. 239). The need for space was corroborated by Carl Hoffman of Miami Beach Kennel Club, one of the organizers of Florida Kennels, Inc. (A. 438) and by Perrine Palmer, an officer of Hollywood Kennel Club and Florida Kennels, Inc. (A. 478).

The record adequately demonstrates that, contrary to Fulton's assertion that it was an economic necessity for a greyhound owner to race at all four Dade-Broward County area tracks, there were more dog owners kenneling at Florida Kennels, Inc. who had three or fewer booking contracts at the area tracks than those who had four contracts. A comparison of the rosters of dog owners racing at each of the four area dog tracks during the 1971-72 season (A. 672) reveals that there were fifteen (15) dog owners not racing at Flagler who raced at one of the other three dog tracks. These fifteen dog owners each had less than four booking contracts at the four area tracks and thus were entitled under the 1970 policy to one kennel at Florida Kennels, Inc. Consequently for Mr. Fulton to have retained two kennels would have deprived one or more of these individuals of any kennel space at all at Florida Kennels, Inc.

Nor is Fulton's assertion that his business was severely disrupted through the application of the four contract/two kennel policy was supported by the record. Although he requested and received a release from his booking contract at Miami Beach Kennel Club beginning January 4, 1973, nevertheless he did keep his contract at Hollywood for the meet beginning January, 1973 and continuing through May 2, 1973 and in 1974 also. He also kept his booking contract at Biscayne Kennel Club for the meet beginning May 5, 1973, and continuing through November 6, 1973 and also in 1974 when he leased his booking to another dog owner (A. 371). Fulton started racing again at Miami Beach in 1975 and he continued to run at Hollywood in 1975 (A. 374). He continued to race at Miami Beach in 1976 and at Hollywood in 1976 (A. 379). He did not race at Biscayne in 1975 or in 1976 (A. 377) because his contract expired at the end of the 1974 meeting and he did not renew it as he had changed his area of work to the dog tracks in Massachusetts (A. 380). During the subsequent years when he had bookings at both Hollywood and a Dade County track operating at the same time, he requested and was provided with two kennels at Florida Kennels, Inc. (A. 539, 540, 544).

REASONS FOR DENYING THE WRIT

1. PETITIONER'S CONSTRUCTION OF THE DECISION BELOW IS NOT CORRECT.

Petitioner clearly misconstrues the Fifth Circuit's decision below on the §2 count when he states that:

> "The Fifth Circuit has here held that the exercise of monopoly power is violative of §2 of the Sherman Act only when such exercise has an anti-competitive effect on competitors of the one wielding such power." (P. 8)

Nowhere is such an assertion made in the entire opinion below.

The Court of Appeals first analyzes Petitioner's unproved assumption that Flagler had monopoly power in the relevant market (PA. 5a-7a) which underlays each branch of Petitioner's §2 argument. While casting doubt on the existence of monopoly power the Court below concluded that Petitioner's argument for the existence of monopoly power need not be evaluated because no evidence was presented by Petitioner that Flagler used whatever power it had to enhance or maintain its position. Thus Petitioner could not come within the exception to the *Colgate* doctrine ("in the absence of any purpose to create or maintain a monopoly") and thus Flagler was free to exercise its independent discretion as to parties with whom it would deal. *United States v. Colgate & Co.*, 250 U.S. 300 (1919). See *United States v. Grinnell Corp.*, 384 U.S. 563 at 570-571 (1966); *Lorain Journal Company v. United States*, 342 U.S. 143 (1951). The Court below reasoned that any monopoly power which Petitioner possessed, it had because of the quasi-exclusive nature of its allocation of racing dates which were thrust upon it by the Florida Board of Business Regulation, a position which Flagler would have whether or not Petitioner raced at its track (PA. 7a-8a).

The foregoing analysis was the basis for the Fifth Circuit's decision on the §2 count.

The balance of the Fifth Circuit's opinion on the §2 count (PA. 9a-11a), although perfectly proper, may be regarded as dictum since the Court, out of courtesy to the Petitioner, merely attempts to meet the alternative

argument of Petitioner to the effect that a monopolist has a duty to deal fairly with anyone who seeks to compete in a subjacent* market by having reasonable rules and regulations governing admittance to and exclusion from the market regardless of whether the monopolist competes there or not.

Yet even in this gratuitous analysis, the assertion that Petitioner would have the Fifth Circuit utter, i.e. that a monopolist is free to do anything so long as there is no anti-competitive effect among competitors of the monopolist, is not made. The Fifth Circuit does dwell on the fact that there is no competition between Flagler and Fulton simply because the exclusion of Fulton from the Flager track is the sole anti-competitive effect claimed by Fulton either on an actual or a potential basis.

It should be emphasized that Fulton never alleged or attempted to prove that Flagler used its position as the holder of quasi-exclusive racing dates to control what would be the price for dog racing services, i.e. the prize money or the portion of the pari-mutuel pool which the dog owners raced for and which was the consideration underlying the booking contracts. Obviously, if price maintenance were an issue, actual competition between the monopolist and the members of the subjacent market would not be relevant. The whole line of the so-called "sole source" cases such as *Banana Distributors, Inc. v. United Fruit Co.*, 162 F. Supp. 32 (S.D.N.Y. 1958) relies

*Petitioner lacks precision in the use of the terms "subjacent market" and "adjacent market". Respondents will use the term "adjacent market" to depict a separate market lateral to the alleged monopolist and in which the monopolist also competes. Respondents will use the term "subjacent market" to describe a market in the vertical distribution scheme from the alleged monopolist which contains businesses competing among themselves but not with the alleged monopolist, but which otherwise deal with the monopolist.

upon the monopolist's power to control prices charged by members of a subjacent market to customers further on in the distribution scheme, which power has the inevitable effect of suppressing competition among such subjacent members. However, Petitioner never raised this issue and never introduced any evidence on this point. Consequently the Fifth Circuit could concentrate on situations where competition is directly affected by the power to exclude and, logically, such a situation arises only among actual competitors. Petitioner has always relied upon the so-called "trade association" line of cases such as *Deesen* and this reliance, as the Fifth Circuit has pointed out, is misplaced.

2. THE DECISION BELOW IS IN ACCORD WITH DEESEN V. PROFESSIONAL GOLFERS ASSOCIATION OF AMERICA, 358 F.2d 165 (9th CIR.), CERT. DEN., 385 U.S. 846 (1966).

Having destroyed the straw man Petitioner attempts to create out of the Fifth Circuit's decision, obviously the *Deesen* case does not conflict with the decision below.

In the *Deesen* case, the Ninth Circuit was faced with three separate contentions, as follows:

1. A Sherman Act §1 charge that the P.G.A.'s Rules and Regulations for entrance to P.G.A. tournaments were unreasonable restraints of trade;

2. A combination §1-§2 claim that the P.G.A. and its members *attempted* to combine and conspire to monopolize commerce and boycott Deesen in order to keep him from participating; and

3. Finally, a §2 claim, standing alone (*Id.* at 171) and which the decision below discussed, to the

effect that the P.G.A. constituted an *actual* monopoly because it sponsored or co-sponsored all professional golf tournaments, to enter one of which one had to be a P.G.A. member or a P.G.A. approved player, and thus the P.G.A. had the power to exclude a player for no reason whatsoever.

The Ninth Circuit reasoned that the possession of such exclusionary power was all right so long as it did not destroy competition. Obviously, the Ninth Circuit did not feel that the actual exclusion of Deesen amounted to a restraint of competition in general. The Ninth Circuit was thus distinguishing between the private injury to Deesen and the public injury to competition which the Sherman Act is designed to protect.

Like the case at bar, no evidence was introduced (except for Deesen's exclusion) of any suppression of competition whether in an adjacent, lateral market (the business of sponsoring golf tournaments) or in the subjacent, vertical market of competition among individual golfers.

The Ninth Circuit in fact does not discuss the necessity of having any rules governing admittance or exclusion from the subjacent market when it is discussing the sole §2 charge. Any discussion of the reasonability of such rules is found in the discussion of the §1 count or the combined §1-§2 count.

The Ninth Circuit concludes its discussion of the sole §2 charge by stating:

> *"Speaking only with regard to the evidence of record in this case,* we hold that the trial court did not err in finding and concluding that P.G.A. did not use its power in a way which is violative of §2 of the Sherman Act." *Id.* at 171 (Emphasis supplied.)

Thus, the Fifth Circuit in the case below was on solid ground when it said that the *Deesen* decision should be limited to the circumstances of that case.

What both the Ninth Circuit in *Deesen* and the Fifth Circuit in the case below imply in common is that private injury is not sufficient to prove the public injury necessary for a violation of §2 of the Sherman Act. The power to exclude a competitor in a subjacent market is the threat of a private injury unless there is power to maintain prices or some other power which would foreclose competition in the subjacent market. Such facts were entirely absent from the case below. The matter of private versus public injury was summarized in *Ace Beer Distributors, Inc. v. Stroh Brewery Company,* 318 F.2d 283 at 287 (6th Cir. 1963), *cert. den.,* 375 U.S. 922, as follows:

> "The fact that a refusal to deal with a particular buyer without more may have an adverse effect upon the buyer's business does not make the refusal to deal a violation of the Sherman Act. Damage alone does not constitute liability under the Act.
>
> The present case does not involve price fixing. Nor does it involve an attempt to create a monopoly. The Stroh Brewery Company had one distributor in the territory under consideration before it terminated the plaintiff's franchise.
>
> It continued to have only one distributor thereafter. There is no allegation or contention that the beer of other breweries was not just as available in that area after the change in distributors as it was before. See: *United States v. E. I. duPont deNemours & Company,* 351 U.S. 377, 76 S.Ct. 994, 100 L.ed. 1264.
>
> . . . .

> The substitution of one distributor for another in a competitive market of the kind herein involved does not eliminate or materially diminish the existing competition of distributors of other beers, is not an unusual business procedure, and, in our opinion, is not an unreasonable restraint of trade."

In the final analysis Petitioner's alternative argument depends upon his definition of the relevant market to include only the Flagler dog track. A similar severe restriction of the relevant market was discussed and rejected by the Seventh Circuit in *Mullis v. Arco Petroleum Corp.*, 502 F.2d 290 (7th Cir. 1974) where the severe gasoline shortages of 1973 led to exceptional federal regulatory controls and thus exacerbated the plaintiff distributor's problem when he was terminated by Arco since he could not find another source of gasoline. The Seventh Circuit discussed the relevant market in such a situation as follows:

> Although exceptional regulatory controls may significantly restrain competition within the relevant market, we do not believe they justify a redefinition of the market. For the various brands of gasoline would retain the physical characteristics that make them readily interchangeable for essentially the same uses. Indeed such factors as advertising of particular brands, which tend to differentiate otherwise similar products, become less significant in times of shortage. Whether viewed from the standpoint of the ultimate consumer, or of a distributor such as plaintiff, it would be less important to obtain a particular kind of gasoline than to purchase any gasoline at all. The so-called 'cross elasticity of demand' would tend to enlarge the relative product market as the competition among buyers of petroleum.

> The fact that an injury to a particular competitor may be unusually severe is not a justification for adopting a market definition which only considers the particular product line which he has previously sold or purchased. For in Sherman Act litigation we must adhere to the admonition that the statute is concerned 'with the protection of *competition*, not competitors.' [*Brown Shoe Company v. United States*, 370 U.S. 294, 320, 82 S.Ct. 1502, 1521, 8 L.ed. 2d 510] . . .
>
> If the artificial restraints imposed by the government during a period of shortage make it appropriate to characterize Arco as a monopolist for purposes of construing the Sherman Act, it would seem to follow that each of the twenty other oil companies, and perhaps each of the independent jobbers who sell to retail service stations in the same area, is equally a monopolist. For conceivably if the shortage is sufficiently acute, any one of these distributors might have the power—assuming that no contract or regulatory objection interferes—to discontinue sales to a retailer and, therefore, to put him completely out of business. If such action were violative of §2 the Sherman Act would, in effect, outlaw any change in existing patterns of distribution until after an acute shortage was ameliorated." 502 F.2d 290 at 298-299.

3. THE DECISION BELOW IS IN ACCORD WITH THE PRIOR DECISIONS OF THIS COURT AND RAISES NO NOVEL OR SIGNIFICANT QUESTIONS CONCERNING THE INTERPRETATION OF THE SHERMAN ACT, §2.

No novel or significant problem is raised by the facts of this case. This Court has often considered the threat to competition constituted by the existence of a monop-

olist with regard to businesses in a vertical subjacent market. Indeed the whole line of cases restricting the *Colgate* doctrine with regard to its application to resale price maintenance, a subject which has never been an issue in this case, falls within this area. See *United States v. Parke Davis & Co.*, 362 U.S. 29 (1960).

What Petitioner would have this Court do is overrule *United States v. Colgate & Company* in its entirety and thus bring to each private contract in this country a new dimension, namely, that where differences in bargaining power exist, a Federal Court will automatically reform the contract under §2 of the Sherman Act.

CONCLUSION

For all of the foregoing reasons, the Application for the Writ of Certiorari by Petitioner should be denied.

Respectfully submitted,

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